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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WHOLE WOMAN'S HEALTH; et al., Plaintiffs, vs. KEN PAXTON, Attorney General of Texas; et al, Defendants.	MC Case No. 1:17-mc-00303 DEFENDANT KEN PAXTON'S WRITTEN STATEMENT OF APPEAL OF UNITED STATES MAGISTRATE JUDGE CHANG'S ORDER GRANTING JANE DOE, M.D.'S MOTION TO QUASH DEPOSITION SUBPOENA ISSUED BY DEFENDANTS PAXTON, ET AL.

DEFENDANT KEN PAXTON'S WRITTEN STATEMENT OF APPEAL OF UNITED STATES MAGISTRATE JUDGE CHANG'S ORDER GRANTING JANE DOE, M.D.'S MOTION TO QUASH DEPOSITION SUBPOENA ISSUED BY DEFENDANTS PAXTON, ET AL.

Defendant Ken Paxton ("Paxton") respectfully submits this written statement of appeal pertaining to United States Magistrate Chang's Order Granting Jane Doe, M.D.'s Motion to Quash Deposition Subpoena Issued by Defendants Paxton, et al. ("Order") (ECF No. 25). In support of

its appeal, Paxton respectfully shows the Court as follows:

I. BACKGROUND

Respondent to the motion to quash, Defendant Paxton, is a defendant in the lawsuit *Whole Woman's Health, et. al v. Ken Paxton, et. al,* Cause No. A-17-CV-690-LY, in the United States District Court, Western District of Texas. This lawsuit was filed by several abortion providers, including Planned Parenthood affiliates in Texas, challenging the constitutionality of Senate Bill 8 ("SB 8"), a recently enacted abortion law in Texas. SB 8 requires abortion providers to cause fetal demise prior to performing an abortion procedure known as dilation and evacuation ("D&E"). Plaintiff providers challenge the constitutionality of the law by alleging that the law has the effect of placing a substantial obstacle in the path of a woman who seeks an abortion before the fetus attains viability. The Defendants counter that requiring physicians performing a D&E to cause fetal demise before starting the evacuating phase of the D&E does not impose any significant health risks or burdens on a woman. Defendants contend that one of the three safe and effective methods to induce fetal demise is by administering digoxin. Plaintiff providers allege that using digoxin imposes risks with no medical benefits to the patient, is untested, carries risk, and is not sufficiently effective.

Dr. Doe[1] is an abortion provider and the Medical Director in Hawaii at Planned Parenthood of the Great Northwest and Hawaiian Islands, and is the former Director of Clinical Services for Planned Parenthood Federation of America. Defendant Paxton issued a Subpoena to Testify at a Deposition in a Civil Action ("Subpoena") to Dr. Doe on September 20, 2017, for her deposition on October 6, 2017. After several weeks of negotiation with Dr. Doe's legal counsel

[1] Attorney General Paxton does not concede that Dr. Doe is entitled to proceed in this or the matter before the Texas District Court under a pseudonym.

regarding the deposition with no progress, and with the expedited trial date rapidly approaching, Defendant Paxton reissued a subpoena for October 26, 2017, a date Dr. Doe's counsel previously represented was available for her deposition.[2]

II. APPEAL FROM ORDER

Pursuant to Local Rule 74.1 of the United States District Court of Hawaii, Defendant Paxton specifically appeals the Magistrate's Order on the following bases:

- Magistrate Chang's concerns that the late-issued Subpoena could disrupt the underlying proceedings and potentially violate the agreed-upon deadlines; and
- The Subpoena fails to allow a reasonable time to comply.

See Order.

Dr. Doe also made additional arguments that the Subpoena was unduly burdensome, but Magistrate Chang did not make any rulings regarding that or the relevancy of Dr. Doe's testimony. Magistrate Chang's concern about disrupting the deadlines in the underlying matter is unfounded and clearly erroneous. Melissa Cohen, counsel for Plaintiffs, signed her declaration on October 19, asserting that the deadline for trial witness lists had passed and Dr. Doe was not on either party's list. *See* ECF No. 1-2. Dr. Doe argues this means she cannot be deposed. But on October 20, 2017, the parties had a conference with the Special Master in the underlying matter where the Plaintiffs presented that same argument in an effort to preclude Defendant from taking another doctor's deposition. *See* Ex. 1 (Declaration of Andrew Stephens). The Special Master rejected that argument and the deposition of that doctor was permitted to proceed on October 23, 2017. *See id.*

As counsel for Defendant Paxton informed Magistrate Chang, discovery is expedited and

[2] A full recitation of the timeline of these negotiations and Defendant Paxton's repeated attempts to obtain the cooperation of Dr. Doe in complying with the Subpoena is supplied in Defendant Paxton's Response to Court's Order Regarding Reasonableness of Deposition Subpoena, ECF No. 8.

ongoing. Just Monday, Defendant Paxton received a large production of documents from Plaintiffs, a number of which are emails from or to Dr. Doe. Neither the Special Master nor the district court obviously contemplated the initial October 16 deadline for trial witness lists as final based on continuing discovery, the lack of a discovery cutoff, and the fact that *final* trial witness lists are due October 30, 2017. The scheduling order in the underlying matter does not justify quashing the subpoena. Magistrate Chang's ruling on this issue is clearly erroneous and must be overruled.

Defendant Paxton fully explained the reasonableness of the timing of the Subpoena in his Response to the Court's Order Regarding Reasonableness of Deposition Subpoena, ECF No. 8, and fully incorporates that response herein without repeating it.

In finding that the Subpoena failed to allow a reasonable time to comply, the Magistrate's Order focuses on the timing of the second issued Subpoena on October 19, 2017, to the date of the noticed deposition of October 26, 2017. *See* Order, at 4-9. However, the Court acknowledged that Dr. Doe was on notice, from September 20, 2017 – the date of the first Subpoena for Dr. Doe's deposition on October 6, 2017 – that Paxton sought to depose her. The Court mistakenly concludes that Defendant Paxton was similarly on notice that Dr. Doe was contemplating a motion to quash. *See id.*, at 6. As the communications attached to Christopher Hilton's Declaration demonstrates, Defendant Paxton was *not* on notice that counsel for Dr. Doe was planning on filing a motion to quash, and did not know that a motion to quash had been filed until October 24, 2017. *See* Declaration of Christopher D. Hilton ("Dec. Hilton") (ECF No. 9-1), at 3. Unbeknownst to Defendant Paxton, counsel for Dr. Doe had been preparing the motion to quash since October 19, 2017, based on the declarations submitted with the motion, *see* ECF No. 1-2, at 3, while at the same time negotiating with Defendant Paxton to schedule and set the parameters of the deposition.

See ECF No. 8-6.

The Magistrate's Order states that the record does not reflect that counsel for Dr. Doe asked that she be deposed in Honolulu. *See* Order, at 7. On the contrary, as set out in the pleadings, exhibits, and argued at the hearing, counsel for Dr. Doe stated Defendant Paxton should notice the deposition for Honolulu, accepted service of the Subpoena for Honolulu, and never disclosed to Defendant Paxton's counsel that Dr. Doe was actually domiciled in Los Angeles until this was revealed in Dr. Doe's declaration to the motion to quash. Counsel for Defendant Paxton attempted to set the deposition in Los Angeles and was then informed by counsel for Dr. Doe that the deposition could not take place there. The Magistrate's Order fails to cite to this email dated October 17, 2017, in which Dr. Doe's counsel, Perlette Jura, tells Christopher Hilton, counsel for Paxton, that she does not have agreement to move the deposition to Los Angeles. *See* ECF No 8-6, at 3. Notably, on October 25, 2017, counsel for Dr. Doe admitted that *Dr. Doe would not even be in the state of Hawaii on October 26, 2017,* the date on the Subpoena. So regardless of whether her motion to quash would be granted, *Dr. Doe apparently never intended to comply with the terms of the duly noticed subpoena.*

III. CONCLUSION

As Defendant's counsel represented to Dr. Doe's counsel, Defendant Paxton is willing to limit the deposition of Dr. Doe to four hours, is willing to take her deposition in Los Angeles, and is willing to limit the topics of the deposition to the following topics:

- Facts regarding the use, safety, and efficacy of techniques for causing fetal demise, including digoxin, potassium chloride (KCl), and umbilical cord transection;
- Articles and/or studies participated in or written by Dr. Doe;
- Dr. Doe's work for PPFA and personal knowledge of PPFA practices; and
- Documents, including policies, procedures, and other communications, related to

the above.

The Subpoena issued to Dr. Doe provided reasonable time to comply, seeks relevant testimony, and is not contradicted by the scheduling order in the underlying matter. Defendant Paxton respectfully requests that the Court overrule the magistrate's decision granting the motion to quash and order Dr. Doe to appear for a deposition on October 28, 29, or 30, 2017.

DATED: Honolulu, Hawai'I, this 26th day of October, 2017.

/s/ *Summer R. Lee*
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

IN RE: WHOLE WOMAN'S HEALTH; et al., Plaintiffs, vs. KEN PAXTON, Attorney General of Texas; et al, Defendants.	MC Case No. 1:17-mc-00303 [Case No. 1:17-CV-00690-LY, Pending in the Western District of Texas Austin Division] DECLARATION OF ANDREW B. STEPHENS IN SUPPORT OF DEFENDANT KEN PAXTON'S APPEAL OF MAGISTRATE'S DECISION

I, Andrew B. Stephens, hereby declare as follows:

1. I represent Defendant Ken Paxton, Attorney General of Texas, in *Whole Woman's Health v. Paxton*, Cause No 1:17-CV-00690-LY, in the United States District Court for the Western District of Texas, Austin Division. I make this Declaration in support of Ken Paxton's Appeal from the Magistrate's Order Granting Nonparty Jane Doe, M.D.'s Motion to Quash Deposition Subpoena. I have personal knowledge of the facts set forth below.
2. On October 20, 2017, the parties had a conference with the Special Master in the underlying matter. The Plaintiffs argued that the time for exchanging trial witness lists had passed and thus precluded any further depositions or additions to the list in an effort to preclude Defendant from taking another doctor's deposition.
3. The Special Master rejected that argument and the deposition of that doctor, Sherwood Lynn, M.D., was permitted to proceed on October 23, 2017.
4. Discovery is expedited and ongoing in the underlying matter. On October 23, 2017, Respondent received a large production of documents from Plaintiffs, a number of which are communications from or to Dr. Doe. The date for this production was ordered by the Special Master.
5. Pursuant to the Court's scheduling order in the underlying matter, final trial witness lists are to be exchanged by the parties on October 30, 2017.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of October, 2017, in Austin, Texas.

Andrew B. Stephens

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IN THE UNITED STATES DISTRICT COURT
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WHOLE WOMAN'S HEALTH; et al., Plaintiffs, vs. KEN PAXTON, Attorney General of Texas; et al, Defendants.	MC Case No. 1:17-mc-00303 [Case No. 1:17-CV-00690-LY, Pending in the Western District of Texas Austin Division] CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that a copy of *DEFENDANT KEN PAXTON'S WRITTEN STATEMENT OF APPEAL OF ORDER GRANTING JANE DOE, M.D.'S MOTION TO QUASH DEPOSITION SUBPOENA ISSUED BY DEFENDANTS PAXTON, ET AL.*, was served by the Court's electronic filing system and by email on the 26th day of October 2017, upon the following individuals:

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DATED: Honolulu, Hawai'i, October 26, 2017.

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